Supreme Court, U. S.
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No. 80-643

In the Supreme Court of the United States

OCTOBER TERM, 1980

D.J. STRATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the decision below dismissing his wrongful levy action under 26 U.S.C. 7426, on the ground that he did not have a sufficient interest in certain property seized and sold by the Internal Revenue Service to satisfy the tax liability of a third party.

The pertinent facts may be summarized as follows: In January 1973, a person calling himself M.G. Miller purchased real property in South Carolina in a transaction in which petitioner represented him. One year later, after Miller failed to make the payments due under a purchase money mortgage, the mortgagee assigned the mortgage to petitioner's wife, Delores M. Stratos. At the same time, petitioner began to occupy the property in an attempt to begin the term of possession necessary to acquire title by adverse possession, as provided by South Carolina law. On June 13, 1975, a notice of federal tax lien was filed in the proper

county office in the amount of $46,096.11 against Donald E. Miles, a/k/a Michael G. Miller, a/k/a Robert G. Glore, Jr., a/k/a Robert G. Clore, Jr. Pursuant to this lien, the United States levied upon the interest of Donald E. Miles in the real property (Pet. App. 14-15).

Petitioner and his wife then brought this wrongful levy action in the United States District Court for the District of South Carolina under 26 U.S.C. 7426, seeking to enjoin the sale of the property, on the ground that Donald E. Miles was not the same person as the M.G. Miller who bought the property, and thus had no interest in it. After a trial on the merits, the district court dismissed the suit for lack of jurisdiction. It found that petitioner lacked the requisite interest in the property because his attempted adverse possession had not yet ripened into any substantive ownership interest under South Carolina law (Pet. App. 14-16). The court of appeals affirmed per curiam (Pet. App. 17-18).

1. The decision below correctly upheld the dismissal of petitioner's wrongful levy suit for lack of jurisdiction. Section 7426 of the Internal Revenue Code of 1954 permits suits by persons other than the taxpayer to enjoin a wrongful levy or sale of property for the taxpayer's tax liabilities, but restricts standing to sue to persons who claim an interest in or lien on the seized property. Neither the Code nor the Regulations defines the requisite interest to bring such an action. However, the legislative history of the provision suggests it was intended as a procedural measure to implement the substantive provisions of the Federal Tax Lien Act of 1966, and not as a grant of additional substantive rights. H.R. Rep. No. 1884, 89th Cong., 2d Sess. 3 (1966). Thus, the phrase "interest in * * * property" should be defined in the context of the substantive interests protected by the Act. Those interests, appearing in Section 6323(h) of the Code, are those of owners, secured creditors, mechanic's lienors, certain purchasers, lessees, optionees and buyers under

executory contracts of sale. Accordingly, Section 7426 confers standing on parties other than the taxpayer who claim ownership or an interest of the kind protected by the Federal Tax Lien Act in the property levied on or seized. Indeed, all of the cases applying Section 7426 have concerned third parties alleging one of these interests. *E.g.*, *Rosenblum* v. *United States*, 549 F. 2d 1140 (8th Cir.), cert. denied, 434 U.S. 818 (1977) (ownership alleged); *Alabama Exchange Bank* v. *United States*, 373 F. Supp. 1221 (M.D. Ala. 1974) (security interest alleged).

Whether petitioner's naked possession of the property gives rise to a substantive property interest is a question of South Carolina law that does not warrant review by this Court. Cf. *World Marketing, Ltd.* v. *Hallam*, 608 F. 2d 392, 395 (9th Cir. 1979); *Dugan* v. *Missouri Neon & Plastic Advertising Co.*, 472 F. 2d 944, 949 (8th Cir. 1973); *Crow* v. *Wyoming Timber Products Co.*, 424 F. 2d 93 (10th Cir. 1970). South Carolina law deems a possessor with no claim of right or title to be a trespasser and his possession continues in trespass unless and until it ripens after a period of ten years into a property right recognized by statute. *Adams* v. *Adams*, 200 S.C. 131, 138, 66 S.E.2d 809, 812 (1951). See also *Ellen* v. *Ellen*, 16 S.C. 132, 141 (1881). His right to eject all later trespassers (*Morton* v. *Tolbert*, 111 S.C. 442, 98 S.E. 199 (1919)) thus cannot be equated with a grant of substantive rights to the land. Only under certain circumstances, and after ten continuous years of adverse possession, may an adverse possessor acquire any ownership interest in the land. S.C. Code § 15-67-210 (1976).

Petitioner's possession, beginning no earlier than January 25, 1974, was not for ten continuous years as of the date of the levy. Thus, under South Carolina law, petitioner had

no protected interest in the property that would give him standing to seek to enjoin a levy under Section 7426 of the Code.[1]

2. Contrary to petitioner's further assertion (Pet. 5), the interpretation of federal and South Carolina law by the decision below did not deprive him of his property without due process of law. Petitioner's argument ignores the fact that he has the opportunity to litigate his right to continue in possession of the property in the South Carolina courts in opposition to the person who purchased the property at the tax sale.[2] In any such subsequent litigation between petitioner and the purchaser at the tax sale, the purchaser can assert only whatever title was held by the delinquent taxpayer. See Section 6339(b)(2) of the Code. A state court is better suited to examine and adjudicate the parties' relative claims to the property than is a federal court exercising jurisdiction under the wrongful levy statute. Accordingly, there is no deprivation of any of petitioner's constitutional rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER, 1980

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[1]The district court recognized that the mortgage of Delores Stratos was prior to the tax lien, but correctly held that the levy could not be wrongful as to her, because the levy did not affect her interest (Pet. App. 15). Delores Stratos has not joined in the petition here.

[2]Contrary to petitioner's assertions (Pet. 4, 7, 10), there is no evidence that he was ever dispossessed from the property. Indeed, petitioner states (Pet. 7) that he currently is defending his claim of a right to continued possession in litigation with the purchaser at the tax sale.